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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MICHELLE R. LEHMEIER and MICHELLE WATSON

Appeal 2008-5470
Application 09/803,441
Technology Center 2600

Decided:[1] April 24, 2009

Before KENNETH W. HAIRSTON, JOSEPH F. RUGGIERO, and MAHSHID D. SAADAT, *Administrative Patent Judges*.

HAIRSTON, *Administrative Patent Judge*.

DECISION ON APPEAL

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[1] The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

DECISION ON APPEAL

This is an appeal under 35 U.S.C. §§ 6(b) and 134 from the final rejection of claims 1, 3 to 14, 18 to 20, 22 to 24, 26 to 29, and 32.

We will reverse the non-statutory subject matter rejection of claims 26 and 27, reverse the obviousness rejections of claims 14, 18 to 20, 23, 24, 28, 29, and 32, and sustain the obviousness rejections of claims 1, 3 to 13, 22, 26, and 27.

Appellants have invented a method and a system for matching a color with a corresponding color in a defined color space by scanning an object to produce a color image data signal representative of the object, mapping the color image data signal to the defined color space to ascertain the corresponding color in the color space, determining an identity of the corresponding color, and sending the identity of the corresponding color over a network to a website for purchasing a product of the corresponding color (Fig. 2; Spec. 6 to 9; Abstract).

Claim 1 is representative of the claimed invention, and it reads as follows:

> 1. A method for matching a color with a corresponding color in a defined color space, comprising:
>
> scanning an object having the color to be matched to produce a color image data signal representative of said object;
>
> mapping said color image data signal to the defined color space to ascertain the corresponding color;
>
> determining an identity of the corresponding color; and
>
> sending the identity of the corresponding color over a network to a website for purchasing a product having the corresponding color.

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Bar	US 5,506,946	Apr. 9, 1996
Lee	US 5,528,703	Jun. 18, 1996
Liu	US 5,594,807	Jan. 14, 1997
Ringland	US 5,751,829	May 12, 1998
Knight	US 6,344,853 B1	Feb. 5, 2002 (filed Jan. 6, 2000)
Kohler	US 6,618,499 B1	Sep. 9, 2003 (filed Jun. 1, 1999)

The Examiner rejected claims 26 and 27 under 35 U.S.C. § 101 for being directed to non-statutory subject matter.

The Examiner rejected claims 1, 3, 4, and 11 under 35 U.S.C. § 103(a) based upon the teachings of Kohler and Knight.

The Examiner rejected claims 5 to 8 and 10 under 35 U.S.C. § 103(a) based upon the teachings of Kohler, Knight, and Ringland.

The Examiner rejected claim 9 under 35 U.S.C. § 103(a) based upon the teachings of Kohler, Knight, and Lee.

The Examiner rejected claims 12 and 13 under 35 U.S.C. § 103(a) based upon the teachings of Kohler, Knight, and Bar.

The Examiner rejected claims 14, 19, 20, and 28 under 35 U.S.C. § 103(a) based upon the teachings of Kohler and Ringland.

The Examiner rejected claim 18 under 35 U.S.C. § 103(a) based upon the teachings of Kohler, Ringland, and Lee.

The Examiner rejected claims 22 and 23 under 35 U.S.C. § 103(a) based upon the teachings of Kohler, Knight, Ringland, and Liu.

The Examiner rejected claim 24 under 35 U.S.C. § 103(a) based upon the teachings of Kohler, Ringland, and Liu.

The Examiner rejected claim 26 under 35 U.S.C. § 103(a) based upon the teachings of Kohler and Lee.

The Examiner rejected claim 27 under 35 U.S.C. § 103(a) based upon the teachings of Kohler, Lee, and Knight.

The Examiner rejected claim 29 under 35 U.S.C. § 103(a) based upon the teachings of Kohler, Ringland, and Knight.

The Examiner rejected claim 32 under 35 U.S.C. § 103(a) based upon the teachings of Kohler, Ringland, and Liu.

Turning first to the non-statutory subject matter rejection, the Examiner contends that claims 26 and 27 are rejected because the program code is not necessarily computer program code, because the program code is merely contained on the computer readable medium, and because the computer program code needs to be "encoded, embodied or stored on a computer readable medium in order to permit the computer program code's functionality to be realized" (Ans. 3). Appellants argue (Br. 6) that the Examiner has not provided an explanation as to the basis for the non-statutory subject matter rejection, and that "[s]ince the program code is a functional data structure that is contained in a computer-readable storage medium and that when executed causes a system to perform recited tasks, the program code's functionality can be realized; as a result, claim 26 is directed to statutory subject matter."

Turning to the obviousness rejection of claim 1, the Examiner contends (Ans. 3, 4) that Kohler teaches all of the method steps except for "sending the identity of the corresponding color to the website . . . for purchasing a product having the corresponding color," and that "it would have been obvious to a person of ordinary skill in the art to specifically send the corresponding color taught by Kohler to a shopping website for

purchasing a product having a corresponding color" based upon the teachings of Knight. Appellants argue *inter alia* (Br. 10) that "[t]he teaching in Knight of a purchaser manually selecting a color and communicating the manual selection of that color to a website would not have prompted a person of ordinary skill in the art to send the identity of the mapped color described in Kohler to a website for purchasing a product having the color."

Turning next to the obviousness rejection of claims 14 and 28, the Examiner acknowledges (Ans. 10) that Kohler does not determine a dominant color from a plurality of colors in a selected color region, and does not map a portion of a color image data signal corresponding to the dominant color to a defined color space to ascertain an identity of the corresponding color. The Examiner contends (Ans. 11), however, that Ringland determines a dominant color and performs a mapping based upon the dominant color as set forth in claims 14 and 28. Appellants argue (Br. 16) that "[t]here is no indication or hint here, or anywhere else in Ringland, of a computer determining a *dominant* color within a selected color region of a color image data signal that represents an object that has been scanned by a scanning apparatus, and mapping a portion of the color image data signal corresponding to the *dominant* color to the defined color space."

Turning lastly to the obviousness rejection of claim 26, the Examiner acknowledges (Ans. 17) that Kohler does not describe an object that has texture or processes color image data to produce de-texturized color image data, but contends (Ans. 17, 18) that it would have been obvious to one of ordinary skill in the art to de-texturize a scanned image based upon the teachings of Lee. Appellants argue *inter alia* (Br. 22) that Lee does not teach processing color image data to remove the influence of texture and thereby produce de-texturized color image data for mapping.

ISSUES

Non-statutory subject matter

Have Appellants demonstrated that the Examiner erred by not presenting an explanation of the basis for the rejection?

Obviousness

Have Appellants demonstrated that the Examiner erred by finding that the applied references teach or would have suggested "sending the identity of the corresponding color over a network to a website for purchasing a product having the corresponding color" as set forth in claim 1?

Have Appellants demonstrated that the Examiner erred by finding that the applied references teach or would have suggested a dominant color as set forth in claims 14 and 28?

Have Appellants demonstrated that the Examiner erred by finding that the applied references teach or would have suggested the production of de-texturized color image data, and the mapping of the de-texturized color image data to determine a corresponding color in a defined color space as set forth in claim 26?

FINDINGS OF FACT

1. As indicated *supra*, the claimed method and system scans an object having a color to be matched and produces a color image data signal that is representative of the object, and then maps the color image data signal to a defined color space to find a corresponding color (Fig. 2; Abstract).

2. Kohler describes a method and system for matching a color with a corresponding color in a defined color space (Abstract; col. 1, ll. 14, 15). An object having the color to be matched is scanned to produce a color image

data signal representative of the object (Fig. 1; col. 4, ll. 51, 52; col. 5, ll. 22 to 28). The color image data signal is then mapped to the defined color space to ascertain the corresponding color and thereby determine an identity of the corresponding color (col. 5, ll. 29 to 46; col. 6, ll. 10 to 31; col. 8, ll. 50 to 59; col. 9, l. 63 to col. 10, l. 13; col. 13, ll. 5 to 23).

3. Kohler teaches that output images from system computer 1 may be sent to a variety of destinations via the World Wide Web (col. 4, ll. 61 to 64).

4. Knight teaches that the World Wide Web is conducive to conducting electronic commerce (col. 1, ll. 61, 62).

5. Knight teaches that color can be taken into consideration when making an electronic purchase (col. 3, ll. 7 to 27; col. 10, ll. 13 to 33; col. 12, ll. 4 to 26).

6. Ringland[2] describes a system that allows a database of patterns (e.g., wallpaper patterns) to be rapidly searched on the basis of exact spectral characteristics of foreground and background pattern colors to display high-resolution, color correct images of retrieved patterns, and to render selected patterns onto photographic images (col. 1, ll. 7 to 15). In operation, the system stores the pattern and color of an object along with precise color characteristics so that patterns and colors of the object and related products can be rapidly displayed and searched without resort to old-fashioned sample books (col. 4, ll. 49 to 54; col. 14, ll. 53 to 59; col. 19, ll. 38 to 51; col. 22, ll. 19 to 46).

[2] Ringland, like Appellants, recognizes that a surface characteristic such as texture influences the apparent color of an object (col. 7, ll. 22 to 24; Spec. 21)).

7. Lee recognizes that a textured object has brightness discontinuities and that the texture should be removed from the object of interest during image processing (Fig. 3; col. 6, l. 54 to col. 7, l. 3).

PRINCIPLES OF LAW

Non-statutory subject matter

The Examiner bears the initial burden of presenting a prima facie case, and, if the Examiner meets the initial burden, then Appellants have the burden of presenting a rebuttal to the prima facie case. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992).

Obviousness

In rejecting claims under 35 U.S.C. § 103, it is incumbent upon the Examiner to establish a factual basis to support the legal conclusion of obviousness. *See In re Fine*, 837 F.2d 1071, 1073 (Fed. Cir. 1988).

The Examiner's articulated reasoning in the rejection must possess a rational underpinning to support the legal conclusion of obviousness. *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006).

"[I]f a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill." *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1740 (2007).

The test for obviousness is what the combined teachings of the references would have suggested to the artisan. Accordingly, one can not show nonobviousness by attacking references individually where the rejection is based on a combination of references. *In re Keller*, 642 F.2d 413, 425 (CCPA 1981).

ANALYSIS

Non-statutory subject matter

As indicated *supra*, Appellants argue that the Examiner has not presented an explanation directed to the basis for finding that claims 26 and 27 are directed to non-statutory subject matter under the provisions of 35 U.S.C. § 101. We agree with Appellants' argument (Br. 6) that the Examiner has not made any findings or presented any reasoning as to why claims 26 and 27 run afoul of the provisions of 35 U.S.C. § 101. In the absence of such as explanation, we agree with Appellants that the claimed program code is directed to functional data structure that, when executed, causes a system to perform recited tasks. Accordingly, the non-statutory subject matter rejection of claims 26 and 27 is reversed for failure of the Examiner to meet the initial burden of informing Appellants of a reason for rejecting the claims. *Oetiker*, 977 F.2d at 1445.

Obviousness

As indicated *supra* (FF 2, 3), Kohler describes all of the method steps of claim 1 including sending color data over the World Wide Web. Kohler does not indicate that the transmitted color data is used for purchasing a product having a corresponding color as the scanned object. On the other hand, Knight teaches that color can be taken into consideration when making an electronic purchase via the World Wide Web (FF 4, 5). In view of the teachings of the references, we agree with the Examiner that it would have been obvious to the skilled artisan to send the color data in Kohler via the World Wide Web for the purpose of purchasing a product of the same color as taught by Knight. *Kahn*, 441 F.3d at 988; *Fine*, 837 F.2d at 1073. Appellants' argument (Br. 10) that Knight does not describe all of the steps

of claim 1 is without merit since the Examiner relied on the combined teachings of the references. *Keller*, 642 F.2d at 425. Thus, the obviousness rejection of claim 1 based upon the teachings of Kohler and Knight is sustained. The same holds true for claims 3, 4, and 11, which were argued with claim 1 (Br. 7).

The obviousness rejection of claims 5 to 8 and 10 is sustained because Appellants have not presented any patentability arguments for these claims apart from the arguments presented for claim 1 (Br. 14).

The obviousness rejection of claim 9 is sustained because Appellants have not presented any patentability arguments for this claim apart from the arguments presented for claim 1 (Br. 14).

The obviousness rejection of claims 12 and 13 is sustained because Appellants have not presented any patentability arguments for these claims apart from the arguments presented for claim 1 (Br. 14).

Turning next to the obviousness rejection of claims 14, 19, 20, and 28, we agree with Appellants' argument (Br. 16) that Ringland (FF 6) is silent as to determining a dominant color, and performing a mapping operation based on such a dominant color. In summary, the obviousness rejection of claims 14, 19, 20, and 28 is reversed because the Examiner's articulated reasoning in the rejection does not possess a rational underpinning to support a legal conclusion of obviousness. *Kahn*, 441 F.3d at 988.

The obviousness rejection of claim 18 is reversed because the reference to Lee does not cure the noted shortcoming in the teachings of Kohler and Ringland.

The obviousness rejection of claim 22 is sustained because Appellants have not presented any patentability arguments for these claims apart from the arguments presented for claim 1 (Br. 19).

The obviousness rejection of claim 23 is reversed because the teachings of the additional references to Knight and Liu do not cure the noted shortcoming in the teachings of Kohler and Ringland.

The obviousness rejection of claim 24 is reversed because the teachings of Liu do not cure the noted shortcoming in the teachings of Kohler and Ringland.

The obviousness rejections of claims 26 and 27 are sustained because we agree with the Examiner that it would have been manifestly obvious to the skilled artisan based upon the teachings of Lee (FF 7) to process texturized color image data in Kohler as de-texturized color image data. *KSR*, 127 S. Ct. at 1740. Appellants' argument (Br. 22) attacking the shortcomings in the teachings of Lee are not convincing of the nonobviousness of the claimed invention since the Examiner relied on the combined teachings of the references. *Keller*, 642 F.2d at 425.

The obviousness rejections of claims 29 and 32 are reversed because the references to Knight and Liu do not cure the noted shortcoming in the teachings of Kohler and Ringland.

CONCLUSIONS OF LAW

Non-statutory subject matter

Appellants have demonstrated that the Examiner erred by finding that claims 26 and 27 are directed to non-statutory subject matter.

Obviousness

Appellants have not demonstrated that the Examiner erred by finding that the applied references teach or would have suggested "sending the identity of the corresponding color over a network to a website for purchasing a product having the corresponding color" as set forth in claim 1.

Appellants have demonstrated that the Examiner erred by finding that the applied references teach or would have suggested a dominant color as set forth in claims 14 and 28.

Appellants have not demonstrated that the Examiner erred by finding that the applied references teach or would have suggested the production of de-texturized color image data, and the mapping of the de-texturized color image data to determine a corresponding color in a defined color space as set forth in claim 26.

ORDER

The decision of the Examiner rejecting claims 26 and 27 under 35 U.S.C. § 101 is reversed.

The decision of the Examiner rejecting claims 1, 3 to 14, 18 to 20, 22 to 24, 26 to 29, and 32 under 35 U.S.C. § 103(a) is reversed as to claims 14, 18 to 20, 23, 24, 28, 29, and 32, and is affirmed as to claims 1, 3 to 13, 22, 26, and 27.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART

babc

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